12

No. 7769

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

NEW MISSION MARKET (a corporation),
Appellant,

vs.

UNITED DRUG COMPANY (a Delaware corporation),
Appellee.

BRIEF FOR APPELLEE.

Upon Appeal from the United States District Court for the Northern District of California, Southern Division.

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Table of Contents

		Page
I.	Statement of the case	1
II.	Argument	2
	A. Express provisions in a lease must be given the effect obviously intended	2
	B. Express provision in Liggett lease as analyzed amounts to a conditional limitation as demonstrated by comparison with lease provision involved in case of Jandrew v. Bouche	7
	C. Appellant's attempts to distinguish between case at bar and Jandrew v. Bouche are futile	11
	D. Express provision for termination in Liggett lease is stronger than lease provision involved in Murray Realty Co. v. Regal Shoe Co	13
	E. Appellant's authorities distinguished	16
	F. Appellant's arguments discussed	22
III.	Conclusion	28

Table of Authorities Cited

Pages

California Civil Code, Section 2809 12
California Civil Code, Section 1638 22
California Code of Civil Procedure, Section 1858 5
13 Corpus Juris on Contracts, Section 620, page 599 5

Devonshire v. Langstaff, et al., 83 Cal. App. Dec. 761 (1935) 3, 23

Jandrew v. Bouche, 29 Fed. (2d) 346 (C. C. A. 5th) 7, 8, 9, 11, 12, 28

Kirstein Holding Co. v. Bangor Veritas, Inc., 163 Atl. 655 (Me., 1933) 6

Manhattan Properties, Inc. v. Irving Trust Company, 291 U. S. 320 ..... 25, 27
Murray Realty Co. v. Regal Shoe Co., 270 N. Y. S. 737, reversed in 193 N. E. 164 ..... 13, 14

Outfitters' Operating Realty Co., Inc., Matter of, 69 Fed. (2d) 90 (C. C. A. 2nd), affirmed in 293 U. S. 307 15

5 Page on Contracts (2nd ed.), Section 2598, page 4569 5

2 Remington on Bankruptcy (3rd ed.), Section 789, page 181 27
3 Remington on Bankruptcy (3rd ed.), Section 1222, page 67 3
Roth & Appel, In re, 181 Fed. 667 (C. C. A. 2nd) 12, 16, 25, 28

Schneider v. Springmann, 25 Fed. (2d) 255 (C. C. A. 6th) 12, 15, 18, 28
Sixty-Eight Beacon Street, Inc. v. Sohier, 194 N. E. 303 (Mass., 1935) 18

1 Tiffany on Landlord and Tenant, page 94 6

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I.

STATEMENT OF THE CASE.

Appellant, plaintiff below, is the assignee of the lessor's interest in a certain lease (hereinafter referred to as the Liggett lease), set forth in full in the transcript pages 10 to 32. This appeal is from the judgment of the United States District Court entered upon an order sustaining without leave to amend the demurrer of appellee (defendant) to appellant's complaint.

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*All italics throughout this brief are those of the appellee except where otherwise stated.

Appellant's complaint alleges that Louis K. Liggett Company, the lessee under the Liggett lease was adjudicated a bankrupt on March 31, 1933; that appellee, United Drug Company, a Delaware corporation, assumed the obligations of United Drug Company, a Massachusetts corporation, upon the latter's guaranty of the rentals of the Liggett lease; that rentals for the months of March, 1933 to October, 1933 inclusive were unpaid by either lessee or by lessee's guarantor or by appellee.

Appellee's demurrer challenged the sufficiency of the complaint upon the ground that the complaint failed to state a cause of action against appellee for the latter's liability on its predecessor's guaranty for the reason that the principal obligation was extinguished, that is, the lease had terminated by its own terms upon the date lessee was adjudicated a bankrupt.

II.

ARGUMENT.

A. EXPRESS PROVISIONS IN A LEASE MUST BE GIVEN THE EFFECT OBVIOUSLY INTENDED.

The Liggett lease contained the following provision (Tr. p. 19):

> *"In the event, however, that the Lessee shall be adjudicated a bankrupt, either by voluntary or involuntary proceedings, this lease shall immediately terminate, and said lessors shall have the right immediately to re-enter said premises, and in no event shall this lease be treated as an asset of the lessee after adjudication of bankruptcy,*

> and if the lessee shall become insolvent or fail in business, or if a receiver shall be appointed to take charge of the business of lessee, or receive the rents of the demised premises, or if assignment be made for the benefit of creditors, then this lease may be terminated at once at the option of the lessors expressed in writing, in which event the lessors shall have the right immediately to re-enter the demised premises, and in no event shall this lease be treated as an asset of the lessee after the exercise of said option."

Under the most fundamental rules of law the effect of a lease must be ascertained from the words employed therein.

3 *Remington on Bankruptcy* (3rd ed.), sec. 1222, p. 67, contains the following statement:

> "The lease may be so worded that it will ipso facto terminate on the bankruptcy itself, without the necessity of any declaration of forfeiture, but it may also be so worded as to require such declaration." (Citing *Matter of Jorolemon-Oliver Co.*, 213 Fed. 625 (C. C. A. 2nd, 1914) as being impliedly to that effect.)

No public policy exists that prevents parties to a lease providing therein for the termination thereof upon the happening of any event they may select.

> *Devonshire v. Langstaff, et al.*, 83 Cal. App. Dec. 761 (3rd Cal. App. District (11/25/35)).

In this case judgment for lessees was affirmed in an action brought by lessors to recover rent and taxes after lessor's attempted recall of a written notice under a lease containing the following provision:

"In case Lessees shall fail to perform any condition, covenant or obligation under the terms of this lease, * * * at the election of Lessors, Lessors may terminate this lease by notifying Lessees not less than thirty days prior to the date of the proposed termination of the fact of said breach * * *, the lease shall terminate ipso facto, and without further act on the part of Lessors, * * *".

At page 763 the court said:

"Appellant claims that the judgment in favor of defendant can be sustained only upon the doctrine of election or the doctrine of conditional limitation, and then cites numerous authorities to show that neither doctrine is applicable to the case at bar. However, the judgment need not rest upon either doctrine suggested by appellant, but rather upon the contractual relationship of the parties and their specified method of termination of the lease. There is nothing stipulated in the lease that is beyond the power of the parties. *There is nothing in the contractual provision for the termination of the lease that violates any rule of public policy, and that parties may, in their lease, provide for the termination thereof upon notice different from and superseding that prescribed by the code is well established.* (*Conner v. Jones,* 28 Cal. 60; *Watkins v. McCartney,* 57 Cal. App. 643, 207 Pac. 909; *Buhman v. Nickels & Brown Bros.,* 1 Cal. App. 266; *Jameson v. Chanslor-Canfield Midway Oil Co.,* 176 Cal. 1, 167 Pac. 369; *Wisner v. Richards,* 62 Wash. 429, 113 Pac. 1090; sec. 1946, Civ. Code.)"

The law as to contracts terminating *ipso facto* upon the happening of a certain event under the terms of the contract is analogous.

13 *Corpus Juris on Contracts,* sec. 620, p. 599:

"Duration of Contract in General. Where an agreement expressly stipulates that it is to continue for a particular time or until the happening of a particular event, it of course terminates in accordance with its terms, and not sooner. Provisions limiting the duration of contracts are to be so construed as to effectuate the mutual intention of the parties as evidenced by the language employed. * * *".

5 *Page on Contracts* (2nd ed.), sec. 2598, p. 4569:

"Contract Conditioned on Future Event—In General. A contract may provide in express terms that the happening or not happening of some specified event after the contract is made, shall operate as a termination of some or all of the rights thereunder. Since a condition of this sort is to take place after the contract is made, there is no doubt that it is a true condition, and full effect is given to it in accordance with its terms, subject, however, to the general rule that a condition which operates as a forfeiture is construed strictly in favor of the party against whom it is sought to exact the forfeiture. The termination of a contract by one party in accordance with a provision therein, is not breach, and does not discharge the adversary party if the termination was not by the terms of the contract to act as a discharge, and does not entitle the adversary party to damages. * * *".

Calif. Code of Civil Procedure, sec. 1858, provides:

"In the construction of a statute or instrument, the office of the judge is simply to ascertain and

declare what is in terms or in substance contained therein, *not to insert what has been omitted, or to omit what has been inserted;* and where there are several provisions or particulars, such a construction is, if possible, to be adopted as will give effect to all."

It is true, to be sure, that in many instances, bankruptcy of the lessee does not terminate the lease because either there is no lease clause so providing in which event the lease is not terminated or else the lease clause expressly provides that termination on bankruptcy of a lessee is at the option of the lessor, in which event the lease is not terminated until the exercise of that option.

1 *Tiffany on Landlord and Tenant,* p. 94:

"Bankruptcy. The bankruptcy of the lessee does not, by the great weight of authority, have the effect of terminating the tenancy, *provided the lease contains no provision to that effect,* and unless the trustee in bankruptcy refuses, as hereafter explained, to accept the leasehold interest, it will pass with the bankrupt's other property to such trustee."

To the same effect see:

Kirstein Holding Co. v. Bangor Veritas, Inc.,
163 Atl. 655 (Me. 1933),

in which case at page 656 the court said:

"A lease is not terminated by the adjudication in bankruptcy of the tenant, *unless there be provision to that effect* in the indenture, and, if the trustee renounces the lease, the relations of landlord and tenant between the bankrupt and his

> lessor are not disturbed, the bankrupt retaining 'the term on precisely the same footing as before, with the right to occupy, and the obligation to pay rent'."

However, as appellee has pointed out, under the explicit and unambiguous language of the Liggett lease to the effect that:

> "In the event, * * * the lessee shall be adjudicated a bankrupt, * * * this lease shall immediately terminate, * * * and in no event shall this lease be treated as an asset of the lessee after adjudication of bankruptcy, * * *"

this lease was terminated as to lessee upon adjudication of lessee as bankrupt and the obligations of lessee to pay rentals terminated therewith as to rentals accruing thereafter.

B. EXPRESS PROVISION IN LIGGETT LEASE AS ANALYZED AMOUNTS TO A CONDITIONAL LIMITATION AS DEMONSTRATED BY COMPARISON WITH LEASE PROVISION INVOLVED IN CASE OF JANDREW v. BOUCHE.

Appellee's contention is that the Liggett lease provision for termination on lessee's adjudication in bankruptcy constitutes a conditional limitation and not a condition subsequent. Although the plain meaning of the provision itself is the strongest support for appellee's contention, nevertheless there are decisions which lend further support.

Jandrew v. Bouche, 29 Fed. (2d) 346.

This decision of the Circuit Court of Appeals for the Fifth Circuit involved the ruling of a referee

refusing to allow the lien claim of the landlord for rentals against the bankrupt estate of the lessee which was reversed by the District Court and the ruling of the District Court was, in turn, reversed by the Circuit Court of Appeals for the Fifth Circuit, the last mentioned court holding that the lease contained a conditional limitation and not a condition subsequent solely by reason of the following lease provision:

> "* * * this lease shall be personal to the lessees and shall not inure to the benefit of any receiver or trustee in bankruptcy as an asset of the said lessees."

In the court below it was pointed out and it is now pointed out that the clause in the Liggett lease contains all that the clause in the *Jandrew* case contained and *much* more. Appellee pointed out to the court below and it now repeats that the Liggett lease contains the following significant features:

(1) The clause appears in a paragraph granting permission to the lessee to assign only to a subsidiary or associates of the lessee in the same line of drug business. The fact that the clause appears in the paragraph pertaining to assignments indicates lessors' desire that the lease should be personal to the lessee.

(2) The clause is introduced by the words "In the event, however," which are words of familiar use to legal draughtsmen; they are commonly used to denote that they introduce a clause which shall supersede other clauses in any way repugnant.

(3) The clause is not a part of a covenant by the lessee only but is worded as a conditional limitation

prescribing that in the event of bankruptcy, the lease shall terminate.

(4) The clause contains the unambiguous phrase "shall immediately terminate" and is not qualified by an option to lessor to terminate as is the following clause which appears later in the same paragraph and which refers to lessee's insolvency, failure in business, appointment of a receiver, or assignment for benefit of creditors. (See paragraph (10), infra.)

(5) The clause states that the lease shall terminate in the event the "lessee shall be adjudicated a bankrupt, either by *voluntary or involuntary* proceedings", which shows that the parties to the lease did *not* consider voluntary adjudication in bankruptcy as being *a default* under or breach of the lease *but* treated it as *an event,* the occurrence of which limited the term.

(6) The clause states that "*in no event* shall this lease be treated as an asset of the lessee after adjudication of bankruptcy", showing that the parties intended this lease to be personal to the lessee and is substantially the same language as was used in the lease clause involved in the case of *Jandrew v. Bouche,* supra.

(7) The clause contains the provisions that in event of adjudication the lease shall terminate "and said lessors shall have the right immediately to re-enter said premises", showing that the parties intended that the lessors should not be delayed by any necessity for written notice to terminate and should not be placed in a position in which the trustee in bankruptcy of the lessee could prevent the lessors'

immediate re-entry. Furthermore, the phrase is in the conjunctive, not the disjunctive, and supplements the obvious intention of the parties to prohibit an assignment by operation of law to a bankruptcy trustee.

(8) A *subsequent clause* in the same sentence *does grant an option* to the lessor to terminate in event of lessee's insolvency, failure in business, appointment of receiver or assignment for benefit of creditors as distinguished from bankruptcy.

(9) This latter clause is complete in itself since it contains the further provision that "in no event shall this lease be treated as an asset of the lessee *after the exercise of said option*".

(10) *The clauses expressly discriminate between the event of either lessee's insolvency, failure in business, receivership, or assignment* for benefit of creditors *and the event of lessee's adjudication in bankruptcy.* In the event of either of the first named happenings, the lessor is granted an option. In the event of adjudication as a bankrupt, either by voluntary or involuntary proceedings, the lease expressly provides for its immediate termination with no option. *Appellant fails to answer the question* which so clearly presents itself in the language of the lease: *Why was such discrimination made if the parties did not so intend? Appellant also fails to answer the question: Why,* if such discrimination *was not so intended, was not bankruptcy included in the same clause with insolvency,* failure in business, receivership, etc.? Bankruptcy was placed in a separate clause differently worded. There could have been no oversight because

one provision directly follows the other. It was done *intentionally* and no reason can be assigned except that the termination of the lease in case of bankruptcy was *not* to be *optional but* was to be a conditional *limitation* terminating the leasehold without further act of the parties.

C. APPELLANT'S ATTEMPTS TO DISTINGUISH BETWEEN JANDREW v. BOUCHE AND CASE AT BAR ARE FUTILE.

Appellant attempts, on pages 26-29 of its brief, to distinguish the case of *Jandrew v. Bouche,* supra, from the case at bar on three grounds which we shall answer as we separately consider them.

(1) Appellant states that in the *Jandrew* case, if the court had determined that the lease continued, the landlord's lien claim would have absorbed the whole estate. It is true that on page 347 of the opinion in concluding the statement of facts the court stated in passing that "The lien was allowed to the extent of the proceeds of the assets, approximately $5000.00, which will absorb the entire estate". No reference is made to this fact in dealing with the legal question involved and appellant has no basis to conclude that the court was influenced in any manner thereby. Furthermore, the opinion does not even contain a statement that there were any other creditors to whom the assets would be distributed in the event the claim was disallowed.

(2) Appellant contends that the court's decision is weakened by its own language stating that the ques-

tion was not free from doubt and that there was no *controlling* decision in point. Appellant cannot thus avoid the conclusive effect of the *Jandrew* case upon the case at bar. Since the decision of the *Jandrew* case there is for this court a controlling decision, to-wit, the *Jandrew* case, and if in that case the question was not free from doubt, the facts in this case are so much stronger in favor of the defendant that had they been before the court in the *Jandrew* case, the question would have been free from doubt.

Appellant assumes that the Circuit Court of Appeals for the Fifth Circuit did not have "the contrary decisions" of *Schneider v. Springmann,* infra, and *In re Roth and Appel,* infra, presented to them and from that weak premise of assumption it draws the conclusion that grave doubt must necessarily arise as to whether or not the court's decision would have been the same had those cases been presented to it.

The reasoning is fallacious in that (a) it does not appear that the two cases were *not* considered by the court, and (b) since they are absolutely distinguishable on the facts their citation or consideration would have been of little value and not controlling in any event. (infra, pp. 16, 17 and 18.)

(3) Appellant states that the concurrent execution of the guaranty by the United Drug Company distinguishes the two cases. This cannot be so. The guarantor can be held to no greater liability than the lessee, irrespective of when the guaranty is executed. Section 2809 of the Calif. Civil Code adopts the common law rule:

"The obligation of a guarantor must be neither larger in amount nor in other respects more burdensome than that of the principal; and if in its terms it exceeds it, it is reducible in proportion to the principal obligation."

D. EXPRESS PROVISION FOR TERMINATION IN LIGGETT LEASE IS STRONGER THAN LEASE PROVISION INVOLVED IN CASE OF MURRAY REALTY CO. v. REGAL SHOE CO.

In the court below appellant's counsel relied upon the case of *Murray Realty Co. v. Regal Shoe Co.*, 270 N. Y. S. 737 (Appellate Division) and argued that it presented "a real analogy to the case at bar" to use the words of counsel. The *Murray* case has, since the argument in the court below, been reversed by the New York Court of Appeals by a divided court. The decision appears at 193 N. E. 164.

The *Murray* case was an action for rent for certain months prior to the disaffirmance of the lease by the lessee's receiver and trustee in bankruptcy. The lease involved therein contained these two clauses:

"That an adjudication that the lessee is bankrupt shall ipso facto end and terminate this lease and any rights thereunder."

"The lessor, at its option, may rescind and terminate this agreement upon * * * the breach of any of its conditions or any of the covenants or agreements of said lessee."

The Trial Term (trial court) construed the first of the above clauses as a conditional limitation and dismissed the complaint. The Appellate Division re-

versed the judgment of the Trial Term and gave judgment for the plaintiff on the grounds (1) that the termination by bankruptcy was embodied in covenants by the lessee and therefore should be construed as such, and (2) that since voluntary bankruptcy was not mentioned in the clause, the clause should be limited to *involuntary* bankruptcy.

As we pointed out in the court below, we were not obliged to defend the holding of the dissenting judge in the decision by the Appellate Division. We needed only to point out that in the Liggett lease the paragraph in which the clause under consideration appears does not contain covenants by the lessee. The clause follows covenants by the lessors.

Moreover, the Appellate Division in the *Murray Realty Co.* case explained their decision as follows:

> "The words 'ipso facto' ('by the fact itself', 'in and of itself') should be read in conjunction with the rest of the lease. They are a part of a covenant by the lessee only. The paragraph containing them does not specify *voluntary* bankruptcy * * *" (Italicized by the court.)

The reversal by the Court of Appeals of this decision of the Appellate Division which was so heavily relied upon by the appellant in the court below is very damaging to the appellant's contentions. The majority decision by the New York Court of Appeals is very convincing support for appellee's contentions herein. The decision of the highest New York court was that although the lease contained a clause which *did not specify* lessee's *voluntary* bankruptcy as condition for

termination, nevertheless, it was to be determined strictly by the language of the lease. Such a decision is obvious support for appellee's contentions that a lease which *does* contain a provision for termination on *voluntary* bankruptcy must be terminated in accordance with its more explicit terms.

After referring to Judge L. Hand's statement in the *Matter of Outfitters' Operating Realty Co., Inc.,* 69 F. (2d) 90 at 91 (C. C. A., 2nd), affirmed in 293 U. S. 307, and to the language of *Schneider v. Springmann,* infra, the New York Court of Appeals concluded at page 165 of 193 N. E.:

> "Cogent as such reasoning may be, bankruptcy of the tenant may be made a special limitation upon the term of a lease. The question must be determined by the language of the lease. As Lehman, J., said in *Janes v. Paddell,* 67 Misc. 420, 422, 122 N. Y. S. 760, 761: 'It cannot be disputed that *the parties have a right to provide either that the lease shall terminate at the happening of an event or that the event shall give the landlord the option of terminating it.* The intent of the parties can be determined only from the language of the lease.'
>
> It is easy for the draughtsman of a lease to provide that an adjudication in voluntary bankruptcy shall terminate the lease only if the landlord shall so elect. That is not the language of the lease before us. By a process of judicial construction plain words—'ipso facto end and terminate'—are made to read as if they were a lessor's covenant merely. We are constrained to accept the construction of the trial justice and say that the clause under consideration is a conditional

limitation by reason of which the lease expired upon an adjudication that the lessee is bankrupt. Bankruptcy constitutes a breach of the lease. It thereupon ends and terminates, ipso facto."

E. APPELLANT'S AUTHORITIES DISTINGUISHED.

Appellant's authorities are easily distinguishable. Only three cases upon which appellant places reliance are at all similar on their facts to the case at bar.

(1) *In re Roth and Appel,* 181 Fed. 667 (C. C. A., 2nd). The holding in this case can only be understood by quoting the entire lease clause involved in the case and not merely that portion thereof quoted by counsel. (Appellant's Brief p. 26.) The entire clause (appearing at 181 Fed. 668) reads as follows:

> " 'In case the lessee is declared bankrupt, the lease shall terminate and the lessor has a right to re-enter, in which case the lessee agrees, as a part consideration hereof, that it, and its legal representatives, will pay to the lessor and his legal representatives on the first day of each month, as upon rent days, the difference between the rents and sums reserved and agreed to be paid by the lessee and those otherwise reserved or with due diligence collectible, on account of rents of the demised premises for the preceding month, up to the end of the term remaining at the time of the entry. Such re-entry shall not prejudice the right of the lessor to recover for rent accrued or due at the time of such re-entry.' "

The sole question before the court was whether the following obligation was provable as a claim in bankruptcy, to wit:

> "'* * * in which case the lessee agrees, as a part consideration hereof, that it, and its legal representatives, will pay to the lessor and his legal representatives on the first day of each month, as upon rent days, the difference between the rents and sums reserved and agreed to be paid by the lessee and those otherwise reserved or with due diligence collectible, on account of rents of the demised premises for the preceding month, up to the end of the term remaining at the time of the entry. * * *'"

The question was not whether the termination of the lease was optional with the lessor, since not only had the petition in bankruptcy been filed prior to the beginning of the term, but the lessor had relet the premises before adjudication. In addition thereto, the clause was not nearly as strong as the one now before the court. It did not state that the lease in the event of bankruptcy should *immediately* terminate. Furthermore, it contained the following language (appearing at 181 Fed. 668) which clearly showed that the rent was to continue until actual re-entry, under which circumstances the parties could not well have intended the lease to terminate prior thereto, to wit:

> "Such re-entry shall not prejudice the right of the lessor to recover for rent accrued or due at the time of such re-entry."

The court furthermore recognizes that parties may contract for a termination which shall *not* be op-

tional. We quote from page 671 of the opinion as follows:

> "Undoubtedly the parties to a lease may agree that bankruptcy shall terminate it, and that, upon such termination, all future installments of rent shall at once become due and payable * * *"

(2) *Schneider v. Springmann,* 25 Fed. (2d) 255 (C. C. A. 6th). This case is an authority in favor of the appellee. In the lease involved in the *Schneider* case the word "forfeiture" was used and the question before the court was whether "forfeiture" meant "terminated" or meant "terminable at the option of the lessor". The court held that it meant the latter. The court at least impliedly and probably expressly conceded that if the clause under discussion meant that the lease should "terminate" the holding would have been the other way.

The Liggett lease states that in the event of bankruptcy "this lease shall immediately *terminate*". We quote from the language of the *Schneider* case (appearing at p. 256):

> "The other *controlling* reason is that 'forfeited' and 'terminated' are not synonymous; it would have been easy to say 'terminated'. A thing is hardly 'forfeited' unless it has previously been 'forfeitable' or 'forfeit'. These words strongly imply an election by the person who is to take the thing forfeited. The Century Dictionary definition of the verb used in the applicable form is that the owner by his own act has 'become liable to be deprived of' the article."

(3) *Sixty-Eight Beacon Street, Inc. v. Sohier* (Mass., 1935), 194 N. E. 303. No question of termina-

tion upon lessee's bankruptcy is involved. This decision of the Massachusetts court is furthermore readily distinguishable from the case at bar for two reasons:

1. It turned on a breach of the lease covenant by the lessee that lessee would not assign the lease except under certain conditions. The case at bar involves *no lease covenant* by the lessee *that lessee will not be adjudicated a bankrupt* and therefore no breach can be established.

2. The Sohier lease contained in a separate paragraph other than that quoted by appellant, a covenant by the lessee that in the event of violation by the lessee of any restriction or condition imposed in the lease that the lease might *at the option of the lessor be terminated* in the manner therein provided, whereas in the case at bar one paragraph of the Liggett lease contains the complete and only clauses for termination (a) immediately upon bankruptcy, and (b) upon the exercise of lessor's option upon insolvency, receivership, etc.

An examination of the transcript of record (p. 8) in the above mentioned case (of which this court may take judicial notice) contains a copy of the original lease showing the following lease provisions were involved:

> "The lessee doth hereby covenant and agree to and with the lessor as follows:
>
> Fifth: * * *
>
> Sixth: * * *
>
> Seventh: * * * It is hereby expressly understood and agreed that the character of the oc-

cupancy of the demised premises, as above expressed, is an especial consideration and inducement for the granting of this lease by the Lessor to the Lessee, and in the event of a violation by the Lessee of the restriction against subletting or assignment, or if the Lessee shall cease to occupy the premises without notice to the Lessor, or permit the same to be occupied by parties other than as aforesaid, or *violate any other restriction or condition herein imposed, this lease may, at the option of the Lessor,* through its Board of Directors, *be terminated* in the manner herein provided.

Eighth: * * *

Ninth: That the within lease shall cease, determine and become null and void upon the happening of either or all of the following contingencies:

(a) In case at any time during the term of this lease the Lessee shall attempt to sell, pledge or dispose of said shares of capital stock or any part thereof or this lease otherwise than in accordance with the provisions of the agreement of association, which said provision is stamped upon the certificate of said stock and is hereby made a part of this lease and reads as follows:

> This stock is continuously pledged to the company for the payment of any obligation to the company of the holder of said stock or of any occupant or lessee under said stockholder's proprietary lease and will not be transferred except upon such payment.

No sale or transfer, or pledge, of said stock and no assignment of said proprietary lease shall be made without the written consent of the Board

of Directors of the Company, except as hereinafter provided in case of the death of such stockholder and lessee, * * *

(b) In case at any time hereafter the Lessor shall determine, with the written consent of the holders of eighty-seven and one-half (87½) per cent, in amount of its outstanding capital stock, to sell the property of the Lessor in which the apartment hereby leased shall be, then and in such event this lease and all right and estate of the Lessee thereunder shall at the option of the Lessor terminate after the receipt of thirty (30) days' notice of the Lessor's determination aforesaid to sell and of the aforesaid consent of eighty-seven and one-half (87½) per cent, of the stockholders thereto, and upon or prior to the expiration of thirty (30) days after receipt of such notice the Lessee shall quit and surrender up possession of said premises and this lease shall thereupon cease and determine."

It is to be noted that this case involved a lease provision clearly set forth as a lessee's covenant and the court had only to hold that the express terms of paragraph seventh granting an option to lessor to terminate the lease upon the breach by lessee of any covenant were repugnant to the provisions of paragraph ninth and therefore permitted a construction of the provisions of paragraph ninth which would not be permitted were it not for such repugnancy.

The balance of appellant's authorities are foreign upon their facts. We do not dispute their correctness. These authorities lay down general principles

having to do with circumstances to be taken into consideration in the construction of lease or contract provisions. They hold that a lease or contract provision that it shall become null and void upon *default* by lessee in paying rent or upon some other similar *breach* by a party thereto is to be construed to prevent *forfeiture* by implying a grant of an option to lessor or to the other party to the contract. Such authorities have no application to the situation involved herein, namely, that of clear language showing precise intention of the parties to the lease to terminate on an event not stated to be a breach. Such intention must be given effect irrespective of what motive the parties may have had.

F. APPELLANT'S ARGUMENTS DISCUSSED.

Appellant's arguments appear as follows which we shall answer as we separately consider them.

(1) "The general principles relating to the interpretation of instruments support appellant's decision."

Appellee does not dispute the general principles relating to the interpretation of instruments as those principles are set forth in appellant's brief, pages 9 to 11 inclusive, but appellee desires to call the court's attention to the most familiar rule of interpretation which appellee has ignored, namely, the rule expressed in Calif. Civil Code Section 1638:

> "The language of a contract is to govern its interpretation, if the language is clear and explicit, and does not involve an absurdity."

Could the lease provision involved herein be more clear and explicit? Can it arbitrarily be assumed to be absurd?

(2) **"Courts hold that a mere election to terminate a lease exists, notwithstanding that one particular clause isolated from the rest of the lease, specifically provides for an automatic termination."**

Appellant's arguments contained on pages 11 to 16 inclusive concerning the insertion by inference of an election to terminate is not applicable to the lease provision in the case at bar. It is to be noted that all of the cases cited by appellant relate to the insertion of an election to terminate in a contract or lease which provides for an automatic termination thereof upon default or forfeiture. The lease provision under discussion contains no provision for termination upon the happening of a default or breach and therefore it cannot be said that a forfeiture is involved.

A further answer to appellant's argument based on forfeiture is to be found at page 763 in the report of *Devonshire v. Langstaff,* supra, where the court said:

> "Neither are we concerned with the element of forfeiture. *If the provision for the termination of the lease is a lawful subject of contract undoubtedly it was embodied in the present lease for the benefit of the lessors; if forfeiture is in any way involved it is the forfeiture of the leasehold interest of the tenant.* But here the tenant, the party against whom the forfeiture would operate, has raised no issue of forfeiture and is not claiming any rights under the principles of

law or equity applicable to forfeiture. Lessors, therefore, being beneficiaries under the terms of the lease as to forfeiture, assuming it is found, cannot be heard to complain or raise the issue, it affecting only the rights of the lessees."

(3) **"Bankruptcy of a lessee and especially voluntary bankruptcy is a default."**

Appellee does not dispute the argument that bankruptcy of a lessee may be a default *if* the lease so provides. Appellant's assumption that voluntary bankruptcy of the lessee in the Liggett lease is a default is but to glibly assume the point at issue. Appellee challenges appellant to point out any provision in the Liggett lease under the terms of which lessee covenants to refrain from becoming a bankrupt.

Appellant very illogically argues that since a person may capriciously file a voluntary petition in bankruptcy that the filing thereof must constitute a default under a lease despite the terms of the lease itself. Although it is true that the filing of a voluntary petition in bankruptcy is within the power of the lessee it is not a power that one would contemplate being exercised without need or necessity therefor. Its exercise meant the liquidation of the lessee. It was hardly a right or power that as a practical matter would be used at the whim or caprice of the lessee.

As a matter of fact, it is well established that a lessee's bankruptcy is *never* a breach of or default under any lease unless there is a provision to that effect therein. The effect of lessee's bankruptcy on a lease which contains no clause such as is involved

herein, is that until a lease is disaffirmed by the trustee the trustee is bound thereunder and upon his disaffirmance such lease still remains a liability of the bankrupt. Appellant's argument that lessee's adjudication in bankruptcy constitutes a breach of the lease despite its terms is a misstatement of the law.

Manhattan Properties, Inc. v. Irving Trust Company, etc., 291 U. S. 320;
In re Roth and Appel, supra.

(4) "Viewing the lease as a whole it is apparent that the parties intended a condition subsequent."

Appellant's arguments (pp. 20 and 21) relating to a construction of the instrument by resort to a view of the lease as a whole again loses sight of the fundamental principle that a lease must be given the effect which was obviously intended. If a particular clause as in the case at bar is introduced by the words "In the event, however," the phrase thus introduced must override any repugnant clauses, if any, contained in other parts of the lease. Appellant argues that the provision of the lease "Lessee further covenants and agrees that during all of the lease term created it will maintain its business on the demised premises", has some significance. This is typical of appellant's fallacious reasoning inasmuch as it is obvious that the real issue of this case is: *What event limited the term?*

The parties to this lease expressed their undertakings in clear and concise language to the effect that upon adjudication in bankruptcy, whether through voluntary or involuntary proceedings, the lease should *immediately* terminate. We are at a loss to conceive

of stronger language which could have been used in lieu thereof if the above mentioned result has not been obtained by the language actually employed. The use of such concise and clear language forbids the resort to other clauses of the lease despite any seeming repugnance. Appellee denies that there is any such repugnancy in the Liggett lease.

(5) "The coincidentally executed guaranty irrefutably condemns the construction sought by appellee."

In appellant's effort to write into the words of the Liggett lease an option in the lessor which was obviously intentionally omitted, appellant resorts to the argument that its guaranty was worthless if bankruptcy terminated the lease. There were a number of circumstances under the express terms of the lease which could well account for the execution of the guaranty and give it value:

1. Lessee's failure or refusal to pay rent;

2. Lessee's failure or refusal to perform other covenants;

3. Lessee's receivership;

4. Lessee's assignment for benefit of creditors; and

5. Lessee's insolvency short of bankruptcy.

If we are obliged (though we believe we are not) to account for the *expressed* intention of the parties that the lease should absolutely terminate in the event of bankruptcy and, thereby, to account for their intention as to the scope of the guaranty (which can be no

greater than coextensive with the lease, supra, bottom p. 12), we suggest the following:

This lease was executed in February of 1926 at a time when the effect of bankruptcy upon leases was by no means as clear as it is at the present date.

Manhattan Properties, Inc. v. Irving Trust Co., supra;

2 *Remington on Bankruptcy* (3rd ed.) sec. 789, p. 181.

The lessors may have considered, and the language of one of the clauses under discussion is support therefor, that they did not desire to encounter any complications growing out of proceedings in bankruptcy. It expressly provides that in no event shall the lease be treated as an asset of the lessee after adjudication in bankruptcy.

If the provision as to termination in the event of bankruptcy had been made optional it would have been incumbent upon the lessors to have exercised that option against the lessee's trustee in bankruptcy thereby requiring it to enter into the bankruptcy proceedings. The effect of bankruptcy on leases being none too clear was reason enough to avoid it. The fact that the guarantor itself might become bankrupt may have been an additional reason for avoiding the possibility of the lease going into the hands of a bankruptcy trustee. This they did by express provision. The foregoing may or may not have been the case. We are not obliged to read their thoughts. The parties expressly stated that upon lessee's adjudication of bankruptcy

the lease should immediately terminate and should be no longer considered as an asset of the lessee. How could they have been more emphatic?

We again call to the court's attention that resort to other matters within an instrument itself is not permissible to construe contrary to its own terms unambiguous language contained therein. Appellant's counsel here go farther afield in resorting to matters in a contract between parties other than parties to the lease to construe plain and unambiguous language in the lease to mean other than it expressly states.

(6) "The specific authorities dealing with the bankruptcy of the lessee definitely support appellant's position."

This subdivision of appellant's argument relates entirely to discussion of the cases of *Schneider v. Springmann,* supra, *In re Roth and Appel,* supra, and appellant's attempt to distinguish the case of *Jandrew v. Bouche,* supra, from the case at bar which matters were discussed on pages 11, 12, 16, 17 and 18, supra.

III.

CONCLUSION.

A careful analysis of appellant's arguments shows that appellant argues as follows:

(1) Because the parties could not have intended the lease to terminate upon bankruptcy the language of the lease is ambiguous and therefore it must be construed contrary to its own express terms.

(2) Because lessee's act in filing a petition to be adjudicated a voluntary bankrupt is a breach of or default under the lease (which states that upon the happening of just such an act the lease is terminated) the lease must be construed contrary to its own express terms.

(3) Unambiguous language of the lease must be construed in the light of the effect it might have upon the obligations of *a third party* created by a guaranty executed contemporaneously with the lease.

The foregoing analysis of the arguments made by appellant is in itself sufficient answer to the arguments made. However, we cannot too forcefully emphasize the fallacy that underlies appellant's entire argument, namely, that clear and unambiguous language is open to construction. Counsel has seized upon the elements above noted to create an ambiguity where none exists and then by the same means resolved such nonexistent ambiguity in their own favor. Parties have a right to contract that an act within the control of one of the parties shall terminate their obligation; parties have a right to contract that an act which may constitute a default upon the part of one of the parties shall terminate the obligation; parties have a right to contract that even though a forfeiture is involved the obligation shall terminate; and parties have a right to contract that the termination of their obligation shall, under certain circumstances, be optional and shall, under other circumstances, be abso-

lute. Appellee submits that in the case at bar the parties to the Liggett lease contracted that under the circumstance of bankruptcy adjudication of lessee, the termination of the obligation was absolute.

Dated, San Francisco,
February 3, 1936.

Respectfully submitted,
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